



Deloitte Legal Newsflash

Tax Dispute Resolution

Evidence unlawfully obtained during a visit from the tax authorities is not necessarily excluded

Recently, the Court of Cassation ruled on the possibility to use evidence that was unlawfully obtained by the tax authorities during a home visit (Cass. 21 April 2022, F.17.0136.N).

When tax authorities visit a taxpayer's private premises without prior (legally valid) authorisation from the Police court, the evidence obtained during the visit is not automatically excluded. The Court of Cassation ruled that, even in such cases, the exclusion of evidence is only necessary (and possible) when the so-called "Antigone test in tax matters" requires it.

With its Tax Audit Readiness offering, which includes a thorough training and customised roadmaps, Deloitte Legal can help you prepare for tax audits and (unannounced) visits from the tax authorities.

Prevention is better than cure

The Court's decision illustrates how it has become increasingly difficult for taxpayers to ensure that their rights are respected, especially when they are subject to a tax audit that includes a visit of the taxpayer's premises.

Tax authorities seem to interpret their own investigative powers in an increasingly broader way. Even when it is established that the tax authorities have misused their investigative powers, the application of the Antigone doctrine implies that the evidence obtained must only be excluded in a limited number of cases. Furthermore, even when the decision is made to purge the tax file of the unlawfully obtained evidence, one cannot ignore the fact that, in the meantime, the tax authorities have often already become aware of the evidence, which will continue to play a role even after it was deleted.

It is therefore important for taxpayers to be well prepared for a possible tax audit and, in particular, for an (unannounced) visit of the tax authorities. This is the most effective way to ensure that tax authorities will not unlawfully obtain certain documents, which they can then use – courtesy of “Antigone” – to levy taxes. After all, when a taxpayer is aware of his rights and obligations during a tax audit, he or she is much more likely to demonstrate the necessary resilience to set clear and correct boundaries and to enforce that these boundaries are respected by the tax authorities. Being properly prepared for possible tax investigations is essential in any branch of tax law. This is also true for investigations concerning customs and excise duties, as any related offence can be considered open to criminal prosecution.

The Court of appeal in Ghent on the required authorisation from the Police court

Article 319 of the 1992 Income Tax Code and/or article 63 of the VAT Code, grants tax officials free access to a taxpayer’s business premises and to other places, provided that taxable transactions are being carried out or are likely to be carried out there. Access to private premises is however only allowed between 5 a.m. and 9 p.m. and requires an authorisation from the Police court.

Private home visits are a particularly intrusive measure that, by definition, infringe on the taxpayer’s private life, against which the legislator has provided additional safeguards. In case law, it is generally accepted that the required authorisation from the Police court cannot be regarded as a mere administrative formality. The Police court must decide on the legitimacy of this measure with the full knowledge of the facts and having full jurisdiction.

According to the Court of appeal in Ghent, this means that the Police court must also (be able to) check whether taxable transactions are presumably performed on the private premises. Only then can the authorisation be granted.

In the case discussed here, the Ghent Court of appeal decided that the authorisation was not granted under suspicion that taxable transactions were being carried out, but to allow the tax authorities to collect evidence of fraud.

According to the Court of appeal, the Police court therefore wrongly granted the authorisation or, at the very least, did not legally motivate it, preventing the tax authorities from obtaining lawful access to the private premises. In the absence of the required authorisation, the tax authorities were not allowed to seize documents from the private premises. According to the Court of appeal, the only logical consequence of this assessment is that the tax authorities are prohibited from using these documents to levy taxes.

Although the authorisation of the Police court is not explicitly prescribed under penalty of nullity, the Court of appeal believes that, in this case, there is no ground to apply the “Antigone” theory. The court points out that the text of the law is clear and that the irregularity does not concern a mere formality but rather the absence of substantial legal requirements.

The Court of Cassation and the “Antigone test”

The Court of Cassation reversed the judgement of the Court of appeal in Ghent on the grounds that Belgian tax law does not contain a general provision prohibiting the use of illegally obtained evidence. According to the Court of Cassation, the use of such evidence should therefore be assessed in light of the principles of good administration and the right to a fair trial by applying the so-called “Antigone test in tax matters.”

This test provides that except for specific sanctions provided by law, the use of illegally obtained evidence in tax matters can only be excluded when:

- the evidence is obtained in a manner that is contrary to what may be expected from any well-functioning administration and is to be regarded as inadmissible in all circumstances; or

- the use of the evidence violates the taxpayers' right to a fair trial.

The Court of Cassation concluded that, by refusing to apply the "Antigone test", the Court of appeal in Ghent did not lawfully motivate its decision.

Second chance in Antwerp

The case has now been referred to the Court of appeal in Antwerp, which will have to look into the matter once again. It is to be expected that the Court of appeal in Antwerp will apply the so-called "Antigone test in tax matters."

However, it remains to be seen what the outcome will be and whether the unlawfully obtained evidence will be excluded.

Contacts

If you have any questions concerning the items in this newsflash or wish to find out more about our Tax Audit Readiness offering, please get in touch with your usual Deloitte Legal - *Lawyers* contact at our office in Belgium or:

- Julie Engelen, jengelen@deloitte.com, +32 2 800 71 18
- Annick Visschers, avisschers@deloitte.com, + 32 2 800 70 72
- Filip Smet, fsmet@deloitte.com, + 32 2 800 70 64
- Alexander Baert, abaert@deloitte.com, +32 2 800 71 51

For general inquiries, please contact:

bedeloittelegal@deloitte.com, + 32 2 800 70 00

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